TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 106

THE UNITED STATES OF AMERICA, APPELLANT

vs.

HERMAN ROSENWASSER, AN INDIVIDUAL DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF PERFECT GARMENT COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF COLUMBIA

FILED MAY 29, 1944

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INDEX

595916—44——1

[Names and addresses of attorneys omitted in printing.]

[Citation in usual form showing service on Bernard B. Laven, filed May 3, 1944, omitted in printing.]

In United States District Court

Docket entries

[Title omitted.]

Viol: 29 U. S. C. A.: Sec. 15 (a) (1), 15 (a) (2) & 15 (a) (5) Fair Labor Standards Act of 1938, 15 cts.

1-25-44—Ent. ord. filing & fld. info. & releasg. deft. O. R.

2-23-44—Fld. plea of former jeopardy. Fld. mot. retn. 2-25-44 at 2 P. M. for B/P.

3-3-44—Fld. mot. to quash inform., demurrer, mot. to suppress & affd. of deft. in supp. of mot. to suppress.

3-27-44—* * * Ent. procs. hrg. on demurrer and ent. order sustng. as to counts 1, 2, 4, 5, 6, 7, 9, 11 and 12 and overruling as to counts 3, 8 and 10. * * *

In United States District Court

[Title omitted.]

Order filing information, etc.

Jan. 25, 1944

On motion of Ray H. Kinnison, Esq., Assistant U. S. Attorney, appearing for the Government, who present an Information to the Court in this cause, it is ordered that the said Information be filed and that the defendant, Herman Rosenwasser, doing business under the firm name and style of Perfect Garment Co., be, and he hereby is, released on his own recognizance.

In the District Court of the United States in and for the Southern District of California, Central Division

No. 16564 CR

UNITED STATES OF AMERICA, PLAINTIFF

v.

HERMAN ROSENWASSER, AN INDIVIDUAL DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF PERFECT GARMENT COMPANY, DEFENDANT

Information

Filed Jan. 25, 1944

Violations of 29 U. S. C. A. Sections 15 (a) (1), 15 (a) (2) and 15 (a) (5), Fair Labor Standards Act of 1938

COUNT ONE

Charles H. Carr, United States Attorney in and for the Southern District of California, who, for the United States in this behalf prosecutes in his own proper person, and with leave of court first had and obtained, gives the court here to understand and to be informed as follows, to wit:

1. That Herman Rosenwasser of the City of Los Angeles, Los Angeles County, California, within the Central Division of the Southern District of California, the defendant herein, is, and at all times hereinafter referred to, was the sole owner and operator of a place of business and manufacturing plant which he operates under the fictitious firm name of Perfect Garment Company;

2. That the defendant Herman Rosenwasser is, and at all times hereinafter referred to, was engaged under the fictitious firm name and style of Perfect Garment Company in the business of producing men's and women's coats and suits and Army and Navy Officers' uniforms; that in the course of said business he procures and obtains raw materials, manufactures, and produces therefrom men's and women's coats and suits and Army and Navy Officers' uniforms and sells and ships such garments;

3. That the defendant Herman Rosenwasser is, and at all times hereinafter referred to, was in charge of the aforesaid manufacture and production operations conducted by him and engaged in the supervision and direction of all employees employed by him;

4. That the defendant Herman Rosenwasser is and at all times hereinafter referred to was, an employer within the meaning of and subject to the provisions of the Fair Labor Standards Act of 1938; that the men's and women's coats and suits and Army and Navy officers' uniforms manufactured and produced by the defendant Herman Rosenwasser were, at all times hereinafter referred to, manufactured and produced by him with the intent on the part of the said defendant Herman Rosenwasser that all or some part of said goods would be sold, shipped, transported, and delivered to customers at points outside the State of California; that a substantial portion of the said coats and suits and uniforms so produced were sold, shipped, transported, and delivered to customers at points outside the State of California; that in producing the said coats, suits and uniforms the defendant Herman Rosenwasser produced goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938;

5. That the defendant Herman Rosenwasser, at all times hereinafter referred to, employed and permitted and suffered to work

in the production of goods, to wit: coats, suits, and uniforms, as aforesaid, numerous persons who were employees within the meaning of the Fair Labor Standards Act of 1938;

6. That a large proportion of the said employees was engaged, at all times hereinafter referred to, in the production of goods, to wit: coats, suits and uniforms, for interstate commerce within the meaning of the Fair Labor Standards Act of 1938;

7. That on October 21, 1938, the duly appointed Administrator of the Wage and Hour Division of the United States Department of Labor, pursuant to the authority vested in him by Section 11 (c) of the Fair Labor Standards Act of 1938, duly issued regulations on records to be kept by employers subject to any provision of the Fair Labor Standards Act of 1938; that the said regulations were published in the Federal Register of October 22, 1938, and are known as Title 29, Chapter V, Code of Federal Regulations, Part 516;

8. That the defendant Herman Rosenwasser employed,
7 within the meaning of the Fair Labor Standards Act of 1938, one Grace Walton during the workweek beginning April 5, 1942, and ending April 11, 1942, in the production of goods, to wit: men's and women's coats and suits and Army and Navy Officers' uniforms, for interstate commerce, and the defendant Herman Rosenwasser on or about April 11, 1942, in the City of Los Angeles, Los Angeles County, within the Central Division of the Southern District of California, within the jurisdiction of this court, did unlawfully and willfully make and cause to be made a record required by and kept pursuant to the provisions of Section 11 (c) of the Fair Labor Standards Act of 1938, and the regulations duly issued thereunder, hereinabove referred to and known as Title 29, Chapter V, Code of Federal Regulations, Part 516, then and there knowing such record to be false in a material respect; that is to say, the defendant Herman Rosenwasser did, on or about April 11, 1942, in the City of Los Angeles, County of Los Angeles, within the Central Division of the Southern District of California, within the jurisdiction of this court, unlawfully and wilfully make and cause to be made on a time sheet of said defendant, Herman Rosenwasser, said time sheet bearing the name "Grace Walton" and the date "Apr. 11, '42," the following entries in a column entitled "Reg. Hrs," to wit: opposite the word "Monday" "8"; opposite "Tuesday" "8"; opposite "Wednesday" "8"; opposite "Thursday" "8"; opposite "Friday" "8"; and opposite "total" "40"; which said entries purport to show and in substance and effect declare that the hours worked by the said Grace Walton during the workweek commencing April 5, 1942,

and ending April 11, 1942, were 40, whereas in truth and in fact, as the defendant, Herman Rosenwasser, then and there well knew, the hours worked by said Grace Walton during said workweek were not 40 and in fact were 49;

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided. (Fair Labor Standards Act of 1938.)

COUNT TWO

And the said United States Attorney, in the manner and form aforesaid, further informs the court that:

1. Each and every allegation contained in paragraphs 1 to 7 inclusive of the First Count of this Information is hereby referred to and made a part of this count and incorporated by reference with the same force and effect as if here set forth in full;

2. That the defendant, Herman Rosenwasser, employed within the meaning of the Fair Labor Standards Act of 1938, one Nadya Calloway, during the workweek beginning March 29, 1942, and ending April 4, 1942, in the production of goods, to wit: men's and women's coats and suits and Army and Navy officers' uniforms, for interstate commerce, and the defendant, Herman Rosenwasser, on or about April 4, 1942, in the City of Los Angeles, Los Angeles County, within the Central Division of the Southern District of California, within the jurisdiction of this Court, did unlawfully and wilfully make and cause to be made a record required by and kept pursuant to the provisions of Section 11 (c) of the Fair Labor Standards Act of 1938, and the regulations duly issued thereunder, hereinabove referred to and known as Title 29, Chapter V, Code of Federal Regulations, Part 516, then and there knowing such record to be false in a material respect; that is to say, the defendant, Herman Rosenwasser, did, on or about April 4, 1942, in the City of Los Angeles, County of Los Angeles, within the Central Division of the Southern District of California, within the jurisdiction of this Court, unlawfully and wilfully make and cause to be made on a time sheet of said defendant, Herman Rosenwasser, said time sheet bearing the name "Nadya Calloway" and the date "April 4, 1942," the following entries, to wit: opposite "Monday"; after the word "In" "8," after the word "Out" "4," in a column entitled "Reg. Hrs." "7"; opposite "Tuesday"; after the word "In" "8", after the word "Out" "4," in the said column "7"; opposite "Friday"; after the word "In" "8," after the word "Out" "4," in the said column "7"; opposite "Thursday"; after the word "In" "8," after the word "Out" "4," in said column "7"; opposite "Friday"; after the word "In" "8," after the word "Out" "4," in said column "7"; opposite

"Saturday": after the word "In" "8," after the word "Out" "12," in said column "4"; and after the word "Total" "39"; which said entries purport to show and in substance and effect declare that the hours worked by said Nadya Calloway during the workweek commencing March 29, 1942, and ending April 4, 1942, were 39, whereas in truth and in fact, as defendant, Herman Rosenwasser, then and there well knew, the hours worked by said Nadya Calloway during said workweek were not 39 and in fact were 45;

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided. (Fair Labor Standards Act of 1938.)

COUNT III

And the said United States Attorney, in the manner and form aforesaid, further informs the Court that:

1. Each and every allegation contained in paragraphs 1 to 7, inclusive, of the First Count of this Information is hereby referred to and made a part of this count and incorporated by reference with the same force and effect as if here set forth in full;

2. That the defendant, Herman Rosenwasser, employed within the meaning of the Fair Labor Standards Act of 1938, one Lukena Patella, during the workweek beginning April 12, 1942, and ending April 18, 1942, in the production of goods, to wit: men's and women's coats and suits and Army and Navy officers' uniforms, for interstate commerce, and that the defendant, Herman Rosenwasser, on or about April 17, 1942, in the City of Los Angeles, Los Angeles County, within the Central Division of the Southern District of California, within the jurisdiction of this Court, did unlawfully and wilfully make and cause to be made a record required by and kept pursuant to the provisions of Section 11 (c) of the Fair Labor Standards Act of 1938, and the regulations duly issued thereunder, hereinabove referred to and known as Title 29, Chapter V, Code of Federal Regulations, Part 516, then and there knowing such record to be false in a material respect: that is to say, the defendant, Herman Rosenwasser, did, on or about April 17, 1942, in the City of Los Angeles, County of Los Angeles, within the Central Division of the Southern District of California, within the jurisdiction of this Court, unlawfully and wilfully make and cause to be made on a time sheet of said defendant, Herman Rosenwasser, said sheet bearing the name "Lukena Patella" and the date "April 17, 1942," the following entries, to wit: opposite "Monday": after the word "In" "8:00," after the word "Out" "5:00," in a column entitled "Reg. Hrs." "8"; opposite "Tuesday": after the word "In" "8:00," after the word "Out"

"5:00," and in said column "8"; opposite "Wednesday": after the word "In" "8:00," after the word "Out" "4:30," in said column "8"; opposite "Thursday": after the word "In" "8:00," after the word "Out" "5:30," in said column "8"; opposite "Friday": after the word "In" "8:00," after the word "Out" "5:00," in said column "8"; and opposite the word "Total" "40": which said entries purport to show and in substance and effect declare that the hours worked by said Lukena Patella during the workweek commencing April 12, 1942, and ending April 18, 1942, were 40, whereas in truth and in fact, as defendant, Herman Rosenwasser then and there well knew the hours worked by said Lukena Patella during the said workweek were not 40 and in fact were 42½;

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided. (Fair Labor Standards Act of 1938.)

COUNT FOUR

And the said United States Attorney, in the manner and form aforesaid, further informs the Court that:

1. Each and every allegation contained in paragraphs 1 to 7 inclusive of the First Count of this Information is hereby referred to and made a part of this count and incorporated by reference with the same force and effect as if here set forth in full:

2. That the defendant, Herman Rosenwasser, employed within the meaning of the Fair Labor Standards Act of 1938, one Jennie Green, during the workweek beginning September 13, 1942, and ending September 19, 1942, in the production of goods, to wit: men's and women's coats and suits and Army and Navy Officers' uniforms, for interstate commerce, and that the defendant, Herman Rosenwasser, on or about September 18, 1942, in the City of Los Angeles, Los Angeles County, within the Central Division of the Southern District of California, within the jurisdiction of this Court, did unlawfully and wilfully make and cause to be made a record required by and kept pursuant to the provisions of Section 11 (c) of the Fair Labor Standards Act of 1938, and the regulations duly issued thereunder, hereinabove referred to and known as Title 29, Chapter V, Code of Federal Regulations, Part 516, then and there knowing such record to be false in a material respect; that is to say, the defendant, Herman Rosenwasser, did, on or about September 18, 1942, in the City of Los Angeles, County of Los Angeles, within the Central Division of the Southern District of California, within the jurisdiction of this Court, unlawfully and wilfully make and cause to be made on a time sheet of the said defendant, Herman Rosenwasser, said sheet bearing the name

"Jennie Green" and the date "9/18/42," the following entries, to wit: opposite "Monday"; after the word "In" "8," after the word "Out" "4:30"; opposite "Tuesday"; after the word "In" "8," after the word "Out" "4:30"; opposite "Wednesday"; after the word "In" "8," after the word "Out" "4:30"; opposite "Thursday"; after the word "In" "8," after the word "Out" "4:30"; opposite "Friday" after the word "In" "8", after the word "Out" "4:30";

which said entries purport to show and in substance and
13 effect declare that said Jennie Green, during the workweek commencing September 13, 1942, and ending September 19, 1942, did not work on Saturday, September 19, 1942, whereas in truth and in fact as defendant, Herman Rosenwasser, then and there well knew, the said Jennie Green did work on Saturday, September 19, 1943, and that the total hours worked by said Jennie Green in said workweek were in excess of those recorded by the defendant as having been worked by said Jennie Green.

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided. (Fair Labor Standards Act of 1938.)

14 COUNT V

And the said United States Attorney, in the manner and form aforesaid, further informs the Court that:

1. Each and every allegation contained in paragraphs 1 to 7, inclusive, of the First Count of this Information is hereby referred to and made a part of this count and incorporated by reference with the same force and effect as if here set forth in full.

2. That the defendant, Herman Rosenwasser, employed within the meaning of the Fair Labor Standards Act of 1938, one Joseph Krayer during the workweek beginning October 4, 1942, and ending October 10, 1942, in the production of goods, to wit: men's and women's coats and suits and Army and Navy officers' uniforms, for interstate commerce, and that the defendant, Herman Rosenwasser, on or about October 9, 1942, in the City of Los Angeles, Los Angeles County, within the Central Division of the Southern District of California, within the jurisdiction of this Court, did unlawfully and wilfully make and cause to be made a record required by and kept pursuant to the provisions of Sec. 11 (c) of the Fair Labor Standards Act of 1938, and the regulations duly issued thereunder, hereinabove referred to and known as Title 29, Chapter V, Code of Federal Regulations, Part 516, then and there knowing such record to be false in a material respect; that is to say, the defendant, Herman Rosenwasser, did, on or about October 9, 1942, in the City of Los Angeles, County of Los Angeles, within the Central Division of the Southern District of California, within

the jurisdiction of this Court, unlawfully and wilfully make and cause to be made an a time sheet of said defendant, Herman Rosenwasser, said time sheet bearing the name "Joseph Krayer" and the date "Oct 9" 1942, the following entries, to-wit: opposite "Monday": after "In" "8," after the word "Out" "4:30," in a column entitled "Reg. Hrs." "8"; opposite "Tuesday": after "In" "8," after the word "Out" "5," in said column "8"; opposite "Wednesday": after "In" "8," after the word "Out" "4:30," in said column "8"; opposite "Thursday": after "In" "8," after the word "Out" "4:30," in said column "8"; opposite "Friday": after "In" "8"; after the word "Out" "5:30," in said column "8"; and after the word "Total" "40"; which said entries purport to show and in substance and effect declare that the hours worked by said Joseph Krayer during said workweek commencing October 4, 1942, and ending October 10, 1942, were 40, whereas in truth and in fact, as defendant, Herman Rosenwasser, then and there well knew, the hours worked by the said Joseph Krayer were not 40 and in fact were 41½;

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided. (Fair Labor Standards Act of 1938.)

COUNT VI

And the said United States Attorney, in the manner and form aforesaid, further informs the Court that:

1. Each and every allegation contained in paragraphs 1 to 6 inclusive of the First Count of this Information is hereby referred to and made a part of this count and incorporated by reference with the same force and effect as if here set forth in full;

2. That on May 15, 1940, the duly appointed Administrator of the Wage and Hour Division of the United States Department of Labor, pursuant to and in accordance with the authority conferred upon him by Sections 5 and 8 of the Fair Labor Standards Act of 1938, duly issued a Wage Order for the cloaks, suits, and separate skirts division of the apparel industry; that the said Wage Order was published in the Federal Register on May 17, 1940, and is known as Title 29, Chapter V, Code of Federal Regulations, Part 566; that the said Wage Order became effective on July 15, 1940, and has been at all times since said date, and is now, in full force and effect.

3. That the said Wage Order requires every employer to pay to each of his employees who is engaged in the production for interstate commerce, within the meaning of the Fair Labor Standards Act of 1938, of women's coats, suits, and skirts, wages at a rate not less than forty cents (40¢) an hour, from and after July 15, 1940;

4. That on May 15, 1940, the duly appointed Administrator of the Wage and Hour Division of the United States Department of Labor, pursuant to and in accordance with the authority conferred upon him by Sections 5 and 8 of the Fair Labor Standards Act of 1938, duly issued a Wage Order for the men's and boys' clothing division of the apparel industry; that the said Wage Order was published in the Federal Register on May 17, 1940, and is known as Title 29, Chapter V, Code of Federal Regulations, Part 559; that the said Wage Order became effective on July 15, 1940, and has been at all times since said date, and is now, in full force and effect;

5. That the said Wage Order requires every employer to
17 pay to each of his employees who is engaged in the production for interstate commerce, within the meaning of the Fair Labor Standards Act of 1938, of men's and women's coats and suits and Army and Navy Officers' uniforms, wages at a rate not less than forty cents (40¢) an hour, from and after July 15, 1940;

6. That the defendant, Herman Rosenwasser, in the City of Los Angeles, County of Los Angeles, within the Central Division of the Southern District of California and within the jurisdiction of this Court, did, within the meaning of the Fair Labor Standards Act of 1938, employ in the production of goods, to wit: women's coats, suits, and skirts and men's and boys' coats, suits, and tailored uniforms, for interstate commerce, one John M. Gomez, during the workweek beginning November 30, 1941, and ending December 6, 1941, and that the said defendant, in the City of Los Angeles, County of Los Angeles, within the Central Division of the Southern District of California and within the jurisdiction of this Court, did, on or about December 6, 1941, unlawfully and wilfully fail to pay to the said John M. Gomez wages at a rate not less than forty cents (40¢) an hour for the said work so performed by him during the said workweek; that is to say, the defendant did, at the time and place aforesaid, pay to the said John M. Gomez wages at a rate less than forty cents (40¢) an hour, to wit: at the rate of thirty-three cents (33¢) an hour for the said work so performed by him during the said workweek;

Against the peace and dignity of the United States of America and contrary to the form of the statute in such case made and provided. (Fair Labor Standards Act of 1938.)

18 COUNT VII

And the said United States Attorney, in the manner and form aforesaid, further informs the Court that:

1. Each and every allegation contained in paragraphs 1 to 6 inclusive of the First Count of this Information is hereby referred

to and made a part of this count and incorporated by reference with the same force and effect as if here set forth in full.

2. That the defendant, Herman Rosenwasser, in the City of Los Angeles, County of Los Angeles, within the Central Division of the Southern District of California, and within the jurisdiction of this Court, did, within the meaning of the Fair Labor Standard Act of 1938, employ in the production of goods, to wit: men's and women's coats and suits and Army and Navy Officers' uniforms for interstate commerce, as aforesaid, one A. C. Schultz for a workweek longer than forty (40) hours, beginning September 14, 1941, and ending September 20, 1941, and the said defendant, in the City of Los Angeles, County of Los Angeles, within the Central Division of the Southern District of California, and within the jurisdiction of this Court, on or about September 20, 1941, did unlawfully and wilfully fail to pay the said A. C. Schultz wages for the hours in excess of forty (40) worked by the said A. C. Schultz during the said workweek at a rate not less than one and one-half times the regular rate at which the said A. C. Schultz was employed; that is to say, the said defendant did, at the time and place aforesaid, pay compensation to the said A. C. Schultz for his employment in excess of forty (40) hours during the said workweek at a rate less than one and one-half times the regular rate at which he was employed;

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided. (Fair Labor Standards Act of 1938.)

49 COUNT VIII

And the said United States Attorney, in the manner and form aforesaid, further informs the Court that:

1. Each and every allegation contained in paragraphs 1 to 6 inclusive of the First Count of this Information is hereby referred to and made a part of this count and incorporated by reference with the same force and effect as if here set forth in full;

2. That the defendant, Herman Rosenwasser, in the City of Los Angeles, County of Los Angeles, within the Central Division of the Southern District of California, and within the jurisdiction of this Court, did, within the meaning of the Fair Labor Standard Act of 1938, employ in the production of goods, to wit: men's and women's coats and suits and Army and Navy Officers' uniforms for interstate commerce, as aforesaid, one Lukena Patella, for a workweek longer than forty (40) hours, beginning March 29, 1942, and ending April 4, 1942, and that the said defendant, in the City of Los Angeles, County of Los Angeles, within the Central Division of the Southern District of California, and within the

jurisdiction of this Court, on or about April 4, 1942, did unlawfully and wilfully fail to pay to the said Lukena Patella wages for the hours in excess of forty (40) worked by the said Lukena Patella during the said workweek at a rate not less than one and one-half times the regular rate at which the said Lukena Patella was employed; that is to say, the said defendant did, at the time and place aforesaid, pay compensation to the said Lukena Patella for her employment in excess of forty (40) hours during the said workweek at a rate less than one and one-half times the regular rate at which she was employed;

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided. (Fair Labor Standards Act of 1938.)

26 COUNT IX

And the said United States Attorney in the manner and form aforesaid, further informs the Court that:

1. Each and every allegation contained in paragraphs 1 to 6 inclusive of the First Count of this Information is hereby referred to and made a part of this count and incorporated by reference with the same force and effect as if here set forth in full;

2. That the defendant, Herman Rosenwasser, in the City of Los Angeles, County of Los Angeles, within the Central Division of the Southern District of California, and within the jurisdiction of this Court, did, within the meaning of the Fair Labor Standards Act of 1938, employ in the production of goods, to wit: men's and women's coats and suits and Army and Navy Officers' uniforms for interstate commerce, as aforesaid, one Grace Walton, for a workweek longer than forty (40) hours, beginning April 5, 1942, and ending April 11, 1942, and that the said defendant, in the City of Los Angeles, County of Los Angeles, within the Central Division of the Southern District of California, and within the jurisdiction of this Court, on or about April 11, 1942, did unlawfully and wilfully fail to pay to the said Grace Walton during the said workweek wages for the hours in excess of forty (40) worked by the said Grace Walton during the said workweek at a rate not less than one and one-half times the regular rate at which the said Grace Walton was employed: that is to say, the said defendant did, at the time and place aforesaid, pay compensation to the said Grace Walton for her employment in excess of forty (40) hours during the said workweek at a rate less than one and one-half times the regular rate at which she was employed;

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided. (Fair Labor Standards Act of 1938.)

21 COUNT X

And the said United States Attorney, in the manner and form aforesaid, further informs the Court that:

1. Each and every allegation contained in paragraphs 1 to 6 inclusive of the First Count of this Information is hereby referred to and made a part of this count and incorporated by reference with the same force and effect as if here set forth in full;

2. That the defendant, Herman Rosenwasser, in the City of Los Angeles, County of Los Angeles, within the Central Division of the Southern District of California, and within the jurisdiction of this Court, did, within the meaning of the Fair Labor Standards Act of 1938, employ in the production of goods, to wit: men's and women's coats and suits and Army and Navy Officers' uniforms for interstate commerce, as aforesaid, one Nathan Berger, for a workweek longer than forty (40) hours, beginning May 31, 1942, and ending June 6, 1942, and that the said defendant, in the City of Los Angeles, County of Los Angeles, within the Central Division of the Southern District of California, and within the jurisdiction of this Court, on or about June 6, 1942, did unlawfully and wilfully fail to pay to the said Nathan Berger during the said workweek wages for the hours in excess of forty (40) worked by the said Nathan Berger during the said workweek at a rate not less than one and one-half times the regular rate at which the said Nathan Berger was employed; that is to say, the said defendant did, at the time and place aforesaid, pay compensation to the said Nathan Berger for his employment in excess of forty (40) hours during the said workweek at a rate less than one and one-half times the regular rate at which he was employed;

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided. (Fair Labor Standards Act of 1938.)

22 COUNT XI

And the said United States Attorney, in the manner and form aforesaid, further informs the Court that:

1. Each and every allegation contained in paragraphs 1 to 6, inclusive, of the First Count of this Information is hereby referred to and made a part of this count and incorporated by reference with the same force and effect as if here set forth in full;

2. That the defendant, Herman Rosenwasser, in the City of Los Angeles, County of Los Angeles, within the Central Division of the Southern District of California, and within the jurisdiction of this Court, did, within the meaning of the Fair Labor Standards Act of 1938, employ in the production of goods, to wit: men's

and women's coats and suits and Army and Navy Officers' uniforms for interstate commerce, one Jennie Green for a workweek longer than forty (40) hours, beginning September 13, 1942, and ending September 19, 1942, and that the said defendant, in the City of Los Angeles, County of Los Angeles, within the Central Division of the Southern District of California, and within the jurisdiction of this Court, on or about September 19, 1942, did unlawfully and wilfully fail to pay to the said Jennie Green during the said workweek wages for the hours in excess of forty (40) worked by the said Jennie Green during the said workweek at a rate not less than one and one-half times the regular rate at which the said Jennie Green was employed; that is to say, the said defendant did, at the time and place aforesaid, pay compensation to the said Jennie Green for her employment in excess of forty (40) hours during the said workweek at a rate less than one and one-half times the regular rate at which she was employed;

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided. (Fair Labor Standards Act of 1938.)

23 COUNT XII

And the said United States Attorney, in the manner and form aforesaid, further informs the Court that:

1. Each and every allegation contained in paragraphs 1 to 6, inclusive, of the First Count of this Information is hereby referred to and made a part of this count and incorporated by reference with the same force and effect as if here set forth in full;

2. That the defendant, Herman Rosenwasser, in the City of Los Angeles, County of Los Angeles, within the Central Division of the Southern District of California, and within the jurisdiction of this Court, did, within the meaning of the Fair Labor Standards Act of 1938, employ in the production of goods, to wit: men's and women's coats and suits and Army and Navy Officers' uniforms for interstate commerce, one Joseph Krayer, for a workweek longer than forty (40) hours, beginning October 4, 1942, and ending October 10, 1942, and that the said defendant in the City of Los Angeles, County of Los Angeles, within the Central Division of the Southern District of California, and within the jurisdiction of this Court, on or about October 10, 1942, did unlawfully and wilfully fail to pay to the said Joseph Krayer during the said workweek wages for the hours in excess of forty (40) worked by the said Joseph Krayer during the said workweek at a rate not less than one and one-half times the regular rate at which the said Joseph Krayer was employed; that is to say, the said defendant did, at the time and place aforesaid, pay compensation to the said Joseph Krayer for his employment in ex-

cess of forty (40) hours during the said workweek at a rate of less than one and one-half the regular rate at which he was employed;

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided. (Fair Labor Standards Act of 1938.)

24 COUNT XIII

And the said United States Attorney, in the manner and form aforesaid, further informs the Court that:

1. Each and every allegation contained in paragraphs 1 to 6 inclusive of the First Count of this Information is hereby referred to and made a part of this count and incorporated by reference with the same force and effect as if here set forth in full:

2. That the defendant, Herman Rosenwasser, on or about April 7, 1942, in the City of Los Angeles, County of Los Angeles, within the Central Division of the Southern District of California, and within the jurisdiction of this Court, unlawfully and wilfully sold, transported, shipped and delivered from a point within the State of California to a point outside the State of California, and in the State of Oregon, to wit: coats and suits, identified by Invoice No. 1758, in the production of which defendant had employed employees for a workweek in excess of forty (40) hours, to whom said defendant failed to make compensation for their employment in excess of forty (40) hours in said workweek at a rate not less than one and one-half times the regular rate at which they were employed, and to whom the said defendant paid wages for the hours worked in excess of forty (40) in said workweek at a rate less than one and one-half times the regular rate at which they were employed, and in the production of which the said defendant had employed employees to whom said defendant failed to pay wages at a rate not less than forty cents (40¢) an hour and to whom defendant paid wages at a rate less than forty cents (40¢) an hour;

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided. (Fair Labor Standards Act of 1938.)

25 COUNT XIV

And the United States Attorney, in the manner and form aforesaid, further informs the Court that:

1. Each and every allegation in paragraphs 1 to 6 inclusive of the First Count of this Information is hereby referred to and made a part of this Count and incorporated by reference with the same force and effect as if here set forth in full;

2. That the defendant, Herman Rosenwasser, on or about June 9, 1942, in the City of Los Angeles, County of Los Angeles, within the Central Division of the Southern District of California, and within the jurisdiction of this Court, unlawfully and wilfully sold, transported, shipped and delivered, from a point within the State of California, to a point outside the State of California, and in the State of Nevada, goods, to wit: suits and coats identified by Invoice No. 3262 in the production of which defendant had employed employees for a workweek in excess of forty (40) hours, to whom said defendant failed to make compensation for their employment in excess of forty (40) hours in said workweek at a rate not less than one and one-half times the regular rate at which they were employed, and to whom the said defendant paid wages for the hours worked in excess of forty (40) in said workweek at a rate less than one and one-half times the regular rate at which they were employed, and in the production of which the defendant had employed employees to whom said defendant failed to pay wages at a rate not less than forty cents (40¢) an hour and to whom defendant paid wages at a rate less than forty cents (40¢) an hour:

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided. (Fair Labor Standards Act of 1938.)

26 COUNT XV

And the said United States Attorney, in the manner and form aforesaid, further informs the Court that:

1. Each and every allegation contained in paragraphs 1 to 6, inclusive, of the First Count of this Information is hereby referred to and made a part of this count and incorporated by reference with the same force and effect as if here set forth in full:

2. That the defendant, Herman Rosenwasser, on or about October 10, 1942, in the City of Los Angeles, County of Los Angeles, within the Central Division of the Southern District of California, and within the jurisdiction of this Court, unlawfully and wilfully sold, transported, shipped, and delivered, from a point within the State of California, to a point outside the State of California, and in the State of Texas, goods, to wit: suits and coats identified by Invoice No. 3938 in the production of which defendant had employed employees for a workweek in excess of forty (40) hours, to whom said defendant failed to make compensation for their employment in excess of forty (40) hours in said workweek at a rate not less than one and one-half times the regular rate at which they were employed, and to whom the said defendant paid wages for the hours worked in excess of forty (40) in

said workweek at a rate less than one and one-half times the regular rate at which they were employed, and in the production of which the said defendant had employed employees to whom said defendant failed to pay wages at a rate not less than forty cents (40¢) an hour and to whom defendant paid wages at a rate less than forty cents (40¢) an hour;

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided. (Fair Labor Standards Act of 1938.)

Whereupon, the said Attorney for the United States prays that due process of law may be awarded against the said defendant to make him answer the premises aforesaid.

CHARLES H. CARR,
United States Attorney.

CHARLES H. VEALE,
Assistant U. S. Attorney.

27 UNITED STATES OF AMERICA,
Southern District of California, ss:

Perry A. Bertram, Attorney, United States Department of Labor, being first duly sworn on his oath says: that he has read the foregoing Information and that the matters contained therein are true and correct to the best of his knowledge and belief.

PERRY A. BERTRAM.

Subscribed and sworn to before me this 20th day of January 1944.

[SEAL] FLORENCE LEE MILLER,
Notary Public in and for the County of Los Angeles, State of California.

My Commission expires January 27, 1946.
[File endorsement omitted.]

28 IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted.]

Demurrer to information

Filed March 3, 1944

Now comes Herman Rosenwasser, defendant in the above-entitled cause, by Bernard B. Laven, his attorney and demurs to the information, and to each and every count thereof, and for grounds of demurrer says:

I

That the Fair Labor Standards Act of 1938, Title 29, Sections 207 (a) (3) and 211 (c) and Regulations made pursuant thereto are violative of the Sixth Amendment to the Constitution of the United States in that the said Sections are too vague, indefinite, and uncertain to constitute a public offense.

II

The Information and each Count thereof fails to charge an offense against the laws of the United States and the provisions of the law alleged therein in each Count of said Information, and are void as being in contravention of the Sixth Amendment to the Constitution of the United States.

III

The facts stated in said Information thereof and each Count thereof do not constitute a crime against the laws of the United States.

A. The Information fails to set forth in Counts I to XV, inclusive, that the alleged employees of the defendant were employed and working at a regular rate of pay and subject to the Act.

That said information in Counts I to XV, inclusive, and each of them is uncertain in the following particulars:

a. That the said Counts of said Information fail to disclose, and it cannot be ascertained therefrom, whether the alleged employees of the defendant were employed and working at a regular rate of pay, subject to the provisions of the Act or working on a piece work basis at an irregular rate of pay.

b. That said information in Counts I to XV, inclusive, and each of them fails to disclose and it cannot be ascertained therefrom how or in what manner defendant is subject to the provisions of the said Act.

c. That the Information in Counts I to XV, inclusive, and each of them fails to disclose and it cannot be ascertained therefrom how, or in what manner the defendant participated in all or any of the acts alleged therein.

IV

That the information in Counts I to XV, inclusive, and each of them is ambiguous for the reasons that it is uncertain and unintelligible.

Wherefore, defendant prays that this Demurrer to said Information, and each Count therein, as to the said Herman
30 Rosenwasser, defendant herein, be sustained and the same be dismissed, and that he be discharged and go forth in accordance with due process of law.

Dated this 2nd day of March 1944.

BERNARD B. LAVEN,
Bernard B. Laven,
Attorney for Defendant.

I, Bernard B. Laven, certify that I have examined the Information herein and investigated the law applicable thereto, and that in my opinion the within Demurrer is well taken; that the same is filed in good faith and not for the purpose of delay.

BERNARD B. LAVEN,
Attorney for Defendant.

31 *Points and authorities*

Naftzer vs. U. S., 200 Fed. 494.
Arnold vs. U. S., 115 Fed. 2nd, 523.
Pierce vs. U. S., 62 S. Ct. 237, 314 U. S. 306. Reversing 115 Fed. 2nd 399.
First Natl. Bank vs. U. S., 206 F. 374, 376, 12 C. C. A. 256.
Lamb vs. U. S., 115 Fed. 2nd, 157.
Johnson vs. U. S., 59 Fed. 2nd, 42., Cert. denied. 287 U. S. 631, 77 L. ed. 547, 53 S. Ct. 831.
U. S. vs. Wilterberger, 5 Wheat. 76, 5 L. ed. 37.
U. S. vs. Katz, 271 U. S. 354, 70 L. ed. 986.
[File endorsement omitted.]

32 IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted.]
[File endorsement omitted.]

Motion for bill of particulars

Filed Feb. 23, 1944

TO CHARLES H. CARR, *United States Attorney:*

Please take notice that the defendant Herman Rosenwasser, by his attorney Bernard B. Laven, moves the Court on the 25th of February 1944, at the hour of 2 P. M., or as soon thereafter as counsel can be heard, for an order directing the United States Attorney to furnish said defendant within a time to be therein specified, a written bill of particulars as to the following matters:

I

Apprise the defendant fully of whether Grace Walton in Count I, Nadya Calloway in Count II, Lukena Patella in Count III, Jennie Green in Count IV, Joseph Krayer in Count V, John H. Gomez in Count VI, S. C. Schultz in Count VII, Lukena
33 Patella in Count VIII, Grace Walton in Count IX, Nathan Berger in Count X, Jennie Green in Count XI, Joseph Krayer in Count XII, each, any or all of them were employed at the time alleged therein on an hourly wage and/or piece work basis.

II

The unlawful and wilful acts of which defendant is charged and time and place, witnesses present and circumstances under which the defendant participated to any extent therein.

BERNARD B. LAVEN,
Bernard B. Laven,
Attorney for Defendant.

Good cause appearing, the time for service of notice herein is shortened to 3 days.

Dated: this 29th day of February 1944.

J. F. T. O'CONNOR, *Judge.*

34 *Points and authorities*

A Bill of Particulars is the appropriate remedy where the indictment is general or indefinite as where the indictment or information does not give the accused sufficient knowledge to enable him to prepare for trial.

Brayton vs. U. S. 74 Fed. 2nd, 385.

A Bill of Particulars should be granted when needed to enable the defendant to attack the indictment.

Singer vs. U. S. 58 Fed. 2nd, 74.

Respectfully submitted,

BERNARD B. LAVEN,
Attorney for Defendant.

Received copy of the within Mo. for Bill of Particulars this 23 day of Febr. 1944.

CHARLES H. CAROT
U. S. Atty.

By R. MACKAY,
Attorney for Plaintiff.

35 In the District Court of the United States

[Title omitted.]
[File endorsement omitted.]

Bill of particulars

Filed March 22, 1944

The Government, in response to the order of Court granting, in part, defendant's request for Bill of Particulars, states that according to its information and belief the following employees were, respectively, employed on the basis set forth after their names:

Count and name of employee:

	Basis of payment
I—Grace Walton	Piece Rate.
II—Nadya Calloway	Piece Rate.
III—Lukena Patella	Hourly Rate.
IV—Jennie Green	Piece Rate.
V—Joseph Kraver	Piece Rate.
VI—John H. Gomez	Piece Rate.
36 VII—S. C. Schultz	Piece Rate.
VIII—Lukena Patella	Hourly Rate.
IX—Grace Berger	Piece Rate.
X—Nathan Berger	Weekly Salary.
XI—Jennie Green	Piece Rate.
XII—Joseph Krayer	Piece Rate.

Dated March 22nd, 1944.

Respectfully submitted,

CHARLES H. CARR,
United States Attorney,

JAMES M. CARTER,
Assistant U. S. Attorney,

V. P. LUCAS,
V. P. Lucas,
Assistant U. S. Attorney,
Attorneys for Plaintiff.

37 In United States District Court

[Title omitted.]
[File endorsement omitted.]

Minute entry of hearing

March 27, 1944

This cause coming on for (1) hearing on defendant's plea of former jeopardy, filed February 23, 1944; (2) hearing on defendant's motion to quash each and every count, pursuant to notice filed March 3, 1944; (3) hearing on Demurrer to Information, pursuant to notice filed March 3, 1944; and (4) for arraignment and plea; V. P. Lucas, Assistant U. S. Attorney, appearing as counsel for the Government; Bernard B. Laven, Esq., appearing as counsel for the defendant, Herman Rosenwasser, who is present; and John Q. Bybee, Court Reporter, being present and reporting the testimony and the proceedings.

Attorney Laven argues in support of motion to quash each and every count and in support of Demurrer. It is ordered that the demurrer be sustained as to counts 1, 2, 4, 5, 6, 7, 9, 11, and 12 and overruled as to counts 3, 8, and 10, and motion to quash is denied.

Attorney Laven now argues in support of defendant's plea of former jeopardy and Attorney Lucas argues in opposition. It is ordered that defendant's plea of former jeopardy be, and it is, overruled as to counts 13, 14, and 15.

The defendant states his true name to be as charged and upon being required to plead to counts 3, 8, 10, 13, 14, and 15 waives reading of the Information and enters his plea of not guilty as to counts 3, 8, and 10 and not guilty by reason of former jeopardy as to counts 13, 14, and 15; whereupon, it is ordered that the case be, and it hereby is, continued to April 24, 1944, at 10 A. M., for setting for trial. Attorney Laven excepts to the Court's adverse ruling as to counts 3, 8, 10, 13, 14, and 15, which exception is ordered noted.

38 In the District Court of the United States

[Title omitted.]

Order on defendant's demurrer

Filed April 13, 1944

The above entitled matter came on regularly for hearing in the above-entitled Court before Honorable Peirson M. Hall, Judge presiding, on March 27, 1944 at 10 o'clock A. M. on defendant's Demurrer to all counts of the Information, the Government being represented by Charles H. Carr, United States Attorney, and by

V. P. Lucas, Assistant United States Attorney, and the defendant being present in person and represented by his counsel, Bernard B. Laven, and the Court being fully advised in the premises;

It is hereby ordered that the Demurrer is sustained as to Counts 1, 2, 4, 5, 6, 7, 9, 11, and 12, which said counts charged violations of Sections 15 (a) (2) and 15 (a) (5) of the Fair Labor Standards Act of 1938 (Title 29 U. S. C., Section 201, et seq.) as to employees alleged to have been employed by the defendant at piece rates on the ground that said counts are insufficient in law to charge an offense under said Act in that the provisions thereof do not apply to piece-rate workers.

Counts 1, 2, 4, 5, 6, 7, 9, 11, and 12, as to which the Demurrer is sustained, are hereby dismissed.

The Demurrer is overruled as to Counts 3, 8, 10, 13, 14, and 15.

Dated April 11, 1944.

PEIRSON M. HALL,
United States District Judge.

39–46 In the District Court of the United States

[Title omitted.]
[File endorsement omitted.]

Petition for appeal

Filed April 24, 1944

Comes now the United States of America, plaintiff herein, and states that on the 11th day of April, 1944, the District Court of the United States for the Southern District of California, Central Division, entered a judgment and order sustaining a demurrer to the information herein, with respect to Counts 1, 2, 4, 5, 6, 7, 9, 11, and 12 thereof, and dismissing the said counts, and that the United States of America, feeling aggrieved at the ruling of the District Court in sustaining the said demurrer with respect to these counts and in dismissing the same, prays that it may be allowed an appeal to the Supreme Court of the United States for a reversal of said judgment and order, and that a transcript of the record in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

Petitioner submits and presents to the court herewith a statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in this cause.

UNITED STATES OF AMERICA,
CHARLES H. CARR,
United States Attorney,
Southern District of California.

[File endorsement omitted.]

47 In the District Court of the United States

[Title omitted.]

Assignment of errors

Filed May 5, 1944

Comes now the United States of America, by Charles H. Carr, United States Attorney for the Southern District of California, and avers that in the record proceedings and judgment and order herein there is manifest error and against the just rights of the said plaintiff, the United States of America, in this, to wit:

1. That the court erred in sustaining the demurrer to the information, with respect to Counts 1, 2, 4, 5, 6, 7, 9, 11, and 12 thereof.

2. That the court erred in dismissing Counts 1, 2, 4, 5, 6, 7, 9, 11, and 12 of the information.

3. That the court erred in holding that Counts 1, 2, 4, 5, 6, 7, 9, 11, and 12 of the information are insufficient in law to charge any offense under Sections 15 (a) (2) and 15 (a) (5) of the Fair Labor Standards Act of 1938, (29 U. S. C. 215 (a) (2) (5)).

4. That the Court erred in holding that Sections 15 (a) (2) and 15 (a) (5) of the Fair Labor Standards Act of 1938 (29 U. S. C. 215 (a) (2) (5)) have no application to piece-rate workers.

CHARLES H. CARR,
United States Attorney,
Southern District of California.

[File endorsement omitted.]

48 In the District Court of the United States

[Title omitted.]

Order allowing appeal to the Supreme Court of the United States

Filed April 24, 1944

This cause having come on this day before the Court on petition of the United States of America, plaintiff herein, praying an appeal to the Supreme Court of the United States for reversal of the order and judgment in the cause sustaining the defendant's demurrer to the information, with respect to Counts 1, 2, 4, 5, 6, 7, 9, 11, and 12 hereof, and dismissing said counts, and that a duly certified copy of the record in said cause be transmitted to the Clerk of the Supreme Court of the United States, and the Court having heard and considered said petition, together with plaintiff's statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in said cause, the same having been duly filed with the Clerk of the Court, it is, therefore, by the Court, ordered and adjudged, that the plaintiff herein, the United States of America, be, and it is hereby, allowed an appeal from the order and judgment of this Court sustaining the defendant's demurrer to the information, with respect to Counts 1, 2, 4, 5, 6, 7, 9, 11, and 12 thereof, and dismissing said counts, to the Supreme Court of the United States, and that a duly certified copy of the record in said cause be transmitted to the Clerk of the Supreme Court.

49–50 It is further ordered, that the United States of America be, and it is hereby, permitted a period of sixty days in which to file and docket the said appeal in the Supreme Court of the United States.

Dated at Los Angeles, California, this 24th day of April 1944.

By the Court:

PEIRSON M. HALL,
United States District Judge
Southern District of California,
Central Division.

[File endorsement omitted.]

51 In the District Court of the United States

[Title omitted.]

Praecipe for transcript of record

Filed May 5, 1944

To the Clerk, District Court of the United States for the Southern District of California, Central Division:

The appellant, the United States of America, hereby directs that in preparing the transcript of the record in this cause in the District Court of the United States for the Southern District of California, Central Division, you include the following:

1. Docket entries and minute entries showing filing of the information, the filing of a motion for a bill of particulars and a demurrer to the information, and the entry of the order sustaining the demurrer with respect to Counts 1, 2, 4, 5, 6, 7, 9, 11, and 12, and dismissing the said counts.
2. The information.
3. The motion for a bill of particulars.
4. The demurrer.
5. The bill of particulars.
6. The order, dated April 11, 1944, sustaining the demurrer with respect to Counts 1, 2, 4, 5, 6, 7, 9, 11, and 12 and dismissing the said counts, and overruling the demurrer with respect to Counts 3, 8, 10, 13, 14, and 15.

52 7. The petition for appeal to the Supreme Court.

8. The statement as to the jurisdiction of the Supreme Court.
9. The assignment of errors.
10. The order allowing appeal.
11. The notice of service on the appellee of the petition for appeal, order allowing appeal, assignment of errors, and statement as to jurisdiction.
12. The citation.
13. The praecipe.

CHARLES H. CARR,
United States Attorney,
Southern District of California.

UNITED STATES OF AMERICA,
Southern District of California, ss:

Fredericka Garrett, being first duly sworn, deposes and says:

That she is a citizen of the United States and a resident of Los Angeles County, California; that she is an employee of the United States Attorney's office, her business address being 600 Federal

Building, Los Angeles, California; that she is over the age of eighteen years, and not a party to the above-entitled action;

That on May 2, 1944, she delivered to Bernard B. Laven, at 608 S. Hill St., Los Angeles, California, attorney for the defendant herein, a copy of the within Praecipe for Transcript of Record, which was received by Mr. Laven.

FREDERICKA GARRETT.

Subscribed and sworn to before me this 5th day of May 1944.

EDMUND L. SMITH,
Clerk of U. S. District Court,
Southern District of California.
By. IRWIN HAMES,
Deputy.
[SEAL]

[File endorsement omitted.]

53 [Clerk's certificate to foregoing transcript omitted in printing.]

54 In the Supreme Court of the United States

Statement of points to be relied on and designation of record

Filed June 22, 1944

Pursuant to Rule XIII, paragraph 9, of this Court, appellant states that it intends to rely upon all of the points in its assignments of error.

Appellant deems the entire record, as filed in the above-entitled cause, necessary for the consideration of the points relied upon.

———, *Solicitor General.*

[File endorsement omitted.]

55 Supreme Court of the United States

Order noting probable jurisdiction

June 12, 1944

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

[Endorsement on cover:] File No. 48,537. S. California, D. C. U. S. Term No. 106. The United States of America, Appellant vs. Herman Rosenwasser, an Individual doing business under the firm name and style of Perfect Garment Company. Filed May 29, 1944. Term No. 106 O. T. 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1944

No. 1044

In the Supreme Court of the United States

OCTOBER TERM, 1943

THE UNITED STATES OF AMERICA, APPELLANT

vs.

HERMAN ROSENWASSER, AN INDIVIDUAL DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF PERFECT GARMENT COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA

STATEMENT AS TO JURISDICTION

In the District Court of the United States for the Southern District of California, Central Division

No. 16564, Criminal

UNITED STATES OF AMERICA, PLAINTIFF

v.

HERMAN ROSENWASSER, AN INDIVIDUAL DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF PERFECT GARMENT COMPANY, DEFENDANT

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment and order of the District Court entered in this cause on April 11, 1944, sustaining a demurrer to the information with respect to Counts 1, 2, 4, 5, 6, 7, 9, 11, and 12 thereof, and dismissing the said counts. Petition for appeal was filed on April 24, 1944, and is presented to the District Court herewith, to wit, on April 24, 1944.

591071—44

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is conferred by the Act of March 2, 1907, 34 Stat. 1246 (as amended by the Act of May 9, 1942, 56 Stat. 401), 18 U. S. C. 682, commonly known as the Criminal Appeals Act, and by Section 238 of the Judicial Code, 28 U. S. C. 345.

STATUTE INVOLVED

The Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; 29 U. S. C. 201 *et seq.*) in pertinent parts provides:

> SEC. 202. Congressional finding and declaration of policy.
>
> (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) inter-

feres with the orderly and fair marketing of goods in commerce.

(b) It is hereby declared to be the policy of sections 201–219 of this title, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

SEC. 203. Definitions.

As used in sections 201–219 of this title—

* * * * *

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer.

* * * * *

(g) "Employ" includes to suffer or permit to work.

(h) "Industry" means a trade, business, industry, or branch thereof, or group of industries, in which individuals are gainfully employed.

* * * * * *

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for

the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

* * * * *

SEC. 206. Minimum wages; effective date.

(a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates:

(4) at any time after the effective date of this section, not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under Section 208 of this title,

(5) if such employee is a home worker in Puerto Rico or the Virgin Islands, not less than the minimum piece rate prescribed by regulation or order; or if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. * * *

SEC. 207. Maximum hours.

(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

* * * * *

(3) for a workweek longer than forty hours after the expiration of the second year from such date (the effective date of section 207 of the act), unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * *

(d) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of sections 201–219 of this title.

* * * * *

SEC. 211. Investigations, inspections, and records.

* * * * *

(c) Every employer subject to any provisions of sections 201–219 of this title or of any order issued under this chapter shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of sections 201–219 of this title or the regulations or orders thereunder.

* * * * *

SEC. 215. Prohibited acts; prima facie evidence.

(a) After the expiration of one hundred and twenty days from the date of enactment of sections 201–219 of this title, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 206, or section 207 of this title, or in violation of any regulation or order of the Administrator issued under section 214 of this title; * * *

(2) to violate any of the provisions of section 206 or section 207 of this title, or any of the provisions of any regulation or order of the Administrator issued under section 214 of this title;

* * * * * * *

(5) to violate any of the provisions of section 211 (c) of this title, or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

* * * * * * *

SEC. 216. Penalties; civil and criminal liability.

(a) Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be sub-

ject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

* * * * *

THE ISSUE AND THE RULING BELOW

On January 25, 1944, the United States Attorney for the Southern District of California filed a fifteen-count information, in the District Court of the United States for the Southern District of California, Central Division, charging the defendant with violations of the record keeping, minimum wage, overtime, and interstate shipment provisions of the Fair Labor Standards Act of 1938 (29 U. S. C. 201 *et seq.*).[1] The defendant filed a motion for a bill of particulars and demurred to the information on the ground, *inter alia*, that "the said counts of the said information fail to disclose, and it cannot be ascertained therefrom, whether the alleged employees of the defendant were employed and working at a regular rate of pay, subject to the provisions of the

[1] On the trial of a prior identical information against the same defendant (S. D. Cal., No. 16152 Criminal) there had been a verdict of guilty on the six counts submitted to the jury; but the District Judge on January 10, 1944, granted the defendant's motion for a new trial. In the present proceeding the defendant filed a plea of former jeopardy, which was denied, however, on the authority of *Craig* v. *United States*, 81 F. (2d) 816 (C. C. A. 9), certiorari denied, 298 U. S. 690.

Act, or working on a piece-work basis at an irregular rate of pay." The district judge granted in part the motion for a bill of particulars, and postponed consideration of the demurrer until after the filing of the bill of particulars, so that the record might show which of the employees referred to in the respective counts of the information were employed on a piece-rate basis. Thereafter, at an oral hearing on March 27, 1944, he sustained the demurrer with respect to Counts 1, 2, 4, 5, 6, 7, 9, 11, and 12 of the information, and he subsequently issued a formal order to that effect, dated April 11, 1944, which is based specifically and solely upon the ground that such counts "are insufficient in law to charge an offense under said (Fair Labor Standards) Act in that the provisions thereof do not apply to piece-rate workers." The order dismissed the nine counts as to which the demurrer was sustained and overruled the demurrer with respect to the other six counts. With the aid of the bill of particulars, the District Judge construed the nine counts as applying to piece-rate workers. That construction of the counts is conclusive; and this leaves no other basis for the order sustaining the demurrer as to the nine counts than the express holding of the District Judge, in his order, that the provisions of the Fair Labor Standards Act "do not apply to piece-rate workers." The order is therefore based exclusively upon a construction of the statute; and consequently it is directly appealable to the Su-

preme Court under the Criminal Appeals Act. *United States* v. *Lepowitch*, 318 U. S. 702, 703–704; *United States* v. *Classic*, 313 U. S. 299, 309; *United States* v. *Kapp*, 302 U. S. 214, 217; *United States* v. *Birdsall*, 233 U. S. 223, 230; *United States* v. *Patten*, 226 U. S. 525, 535; *United States* v. *Heinze*, 218 U. S. 532, 540; *United States* v. *Stevenson*, 215 U. S. 190, 194–195.

THE QUESTION IS SUBSTANTIAL

The Fair Labor Standards Act provides that "every employer shall pay to each of his employees" the prescribed minimum wages. The application of the Act is not conditioned upon the method by which the employee is paid, and there is no exception for employees compensated on a piece-work basis. The statutory definition of "employ" as including "to suffer or permit to work" (Sec 3 (g)) was regarded by the Senatorial sponsor of the statute as "the broadest definition that has ever been included in any one act" (81 Cong. Rec. 7657). If the definition covers all employment, even in the ordinary sense, it must include piece workers. A decision that the Act was inapplicable to piece workers would provide employers with a simple means of evasion by changing from an hourly, daily, or weekly to a piece-work basis of compensation and would seriously impair the effectuation of its objectives.

For all of these reasons we think it obvious that the Act was intended to apply to piece workers.

The Administrator has so construed it from the beginning,[2] and no court heretofore has ever doubted it. Numerous cases have assumed that piece workers are not exempt, as is apparent from decisions in cases in which piece workers were involved.[3] *Walling* v. *American Needlecrafts, Inc.*, 139 F. (2d) 60 (C. C. A. 6), holds the Act applicable to home workers employed on a piece-rate pay basis; although there was no independent discussion of the method of compensation, the reasoning of the opinion, as well as the decision, is in direct conflict with the opinion below in the instant case.[4] In *Overnight Motor Co.* v. *Missel*, 316

[2] See *Interpretative Bulletin No. 4* (originally issued November 1938), paragraph 8: "Where an employee is employed on a piece-work basis, his regular hourly rate of pay is computed by dividing the total weekly piece-work earnings (including production bonuses, if any) by the number of hours worked in the week. For his overtime work the piece-worker is entitled to be paid a sum, in addition to his weekly piece-work earnings, equivalent to one-half the regular hourly rate of pay multiplied by the number of hours worked in excess of 40 in the week. * * *"

[3] See *Walling* v. *T. Buettner & Co.*, 5 Wage Hour Rep. 279 (N. D. Ill.), reversed on another ground, 133 F. (2d) 306 (C. C. A. 7), certiorari denied, 319 U. S. 771; *Holland* v. *United States Bedding Co.*, 5 Wage Hour Rep. 262 (W. D. Tenn.); *Walling* v. *Youngerman-Reynolds Hardware Co.*, 6 Wage Hour Rep. 1117 (N. D. Ala.); *Walling* v. *Harnischfeger*, 7 Wage Hour Rep. 145 (W. D. Wis.).

[4] The Court in the *American Needlecrafts* case called attention to the provision of Section 6 (a) (5) that in the case of home workers in Puerto Rico and the Virgin Island the wage rate to be paid by the employer should be "not less than the minimum piece rate prescribed by regulation or order," which, the court said, "carries with it an inescapable implica-

U. S. 572, 579–580, fn. 15, the Supreme Court likewise has assumed the Act's applicability to piece-rate workers, by suggesting that the reason for the omission of the word "hourly" from the overtime provision of Section 7 (29 U. S. C. 207), as finally enacted, may have been that it was "not descriptive of piece-work or salary payments."

It is thus apparent that the question presented on this appeal is a substantial one.

Appended hereto is a copy of the Order of the District Court of April 11, 1944; the court rendered no opinion.

CHARLES FAHY,
Charles Fahy,
Solicitor General.

APRIL 1944.

[Endorsed]: Filed May 5, 1944. Edmund L. Smith, Clerk. By Francis C. Baxter, Deputy Clerk.

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tion that home workers generally are included in the statutory definition of 'employee.'" Since the same provision refers also to piece rates, it carries an equally inescapable implication that piece-rate workers generally are included.

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No. 106

In the Supreme Court of the United States

OCTOBER TERM, 1944

THE UNITED STATES OF AMERICA, APPELLANT

v.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES

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OPINION BELOW.

No opinion was written by the District Court. The Court's formal order dismissing nine counts of the Information was entered April 13, 1944 (R. 21).

JURISDICTION

The petition for appeal was filed April 24, 1944 (R. 22), and an order allowing the appeal was entered the same day (R. 24). The jurisdiction of this Court is conferred by the Act of March 2, 1907, 34 Stat. 1246, as amended by the

Act of May 9, 1942, 56 Stat. 271, 18 U. S. C. Supp. III, sec. 682, commonly known as the Criminal Appeals Act, and section 238 of the Judicial Code, as amended, 28 U. S. C. sec. 345.[1] This Court, on June 12, 1944, noted probable jurisdiction and transferred the case to the summary docket (R. 26).

QUESTION PRESENTED

The sole issue before the Court is whether the Fair Labor Standards Act of 1938 applies to employees compensated on a piece rate basis.

STATUTE INVOLVED

The statute to be construed on this appeal is the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C. Sec 201 *et seq.* (hereinafter

[1] The District Court's judgment (R. 22, *infra*, p. 4) discloses upon its face that it was based upon a construction of the Fair Labor Standards Act, upon which the information was founded. Under that interpretation the Act was regarded as inapplicable to employees who are compensated at piece work rates. Therefore there can be no doubt that this Court has jurisdiction. *United States* v. *Borden Co.*, 308 U. S. 188, 193–195; *United States* v. *Hastings*, 296 U. S. 188, 192–195; *United States* v. *Yuginovich*, 256 U. S. 450, 464; *United States* v. *Colgate & Co.*, 250 U. S. 300; *United States* v. *Patten*, 226 U. S. 525, 535, 540. Compare *United States* v. *Wayne Pump Co.*, 317 U. S. 200; *United States* v. *Swift & Co.*, 318 U. S. 442. The trial court's interpretation of the information, based upon a bill of particulars (*infra*, pp. 3–4), is not challenged and is binding upon this Court. *United States* v. *Borden Co.*, *supra*, at p. 193; *United States* v. *Hastings*, *supra*, at p. 192.

referred to as the "Act"). The pertinent Sections are printed in the Appendix, *infra*, pp. 17–20.

STATEMENT

This proceeding was instituted by an information filed January 25, 1944 (R. 1), charging, in fifteen separate counts, violations of the minimum wage, overtime, and record-keeping provisions of the Act.[2] Appellee, on March 3, 1944, demurred to the information, principally on the ground that it did not disclose whether the employees, with respect to whom the violations were alleged, were "employed and working at a regular rate of pay, subject to the provisions of the Act or working on a piece work basis at an irregular rate of pay" (R. 16, 17). In response to an order of the court, the Government on March 22, 1944 filed a bill of particulars (R. 20), which disclosed that the employees with respect to whom violations were al-

[2] The first five counts of the information charged the defendant with wilfully failing to keep proper records as required by Section 11 (c) and the regulations issued thereunder, contrary to Section 15 (a) (5). The sixth count charged wilful failure to pay the minimum wage fixed by a wage order of the Administrator, as required by Section 6 (a) (4) and contrary to Section 15 (a) (2). Counts seven to twelve, inclusive, charged wilful failure to pay overtime in accordance with Section 7 (a) (3), contrary to Section 15 (a) (2). Counts thirteen to fifteen charged the defendant with wilfully shipping in interstate commerce goods produced by employees who had not been paid in accordance with requirements of Section 6 and 7, contrary to Section 15 (a) (1).

leged in nine of the counts were piece rate workers.[3] The court sustained the defendant's demurrer with respect to these nine counts (R. 21) on the ground that the provisions of the Fair Labor Standards Act "do not apply to piece-rate workers" (R. 22). On April 13, the court entered a formal order which recited that the counts to which the demurrer was sustained "are insufficient in law to charge an offense under said [Fair Labor Standards] Act in that the provisions thereof do not apply to piece-rate workers" (R. 22). It was not disputed that production for interstate commerce is involved.

SPECIFICATION OF ERROR TO BE URGED

The District Court erred in ruling that the Fair Labor Standards Act is inapplicable to employees compensated at piece rates.

ARGUMENT

THE FAIR LABOR STANDARDS ACT APPLIES TO EMPLOYEES WHO ARE COMPENSATED AT PIECE RATE WAGES

The Fair Labor Standards Act provides in Section 6 (a) that "every employer shall pay to

[3] The bill of particulars showed that the employees with respect to whom violations were charged in three of the remaining counts were employed on an hourly or weekly wage basis. The other three counts charged violation of Section 15 (a) (1), the provision prohibiting shipment of goods produced in violation of the statutory wage and hour standards, and no particular employees were specified in these counts. The demurrer was overruled with respect to these six counts.

each of his employees" wages at not less than the prescribed minimum rates "an hour", and in Section 7 (a) that "no employer shall * * * employ any of his employees" for longer than specified hours in any week without paying overtime compensation "at a rate not less than one and one-half times the regular rate at which he is employed." No exception is stated with respect to employees compensated on a piece rate basis. It is evident from the expressed purposes and other provisions of the Act that no such exception was intended.

The statutory definitions of "employee" as including "any individual employed by an employer" (Sec. 3 (e)) and of "employ" as including "to suffer or permit to work" (Sec. 3(g)) are all-inclusive. The definition of "employee" includes "all employees" with specified exceptions (S. Rep. 884, 75th Cong., 1st sess., p. 6) and was authoritatively stated upon the floor of the Senate during the discussion of the fair labor standards bill to be "the broadest definition that has ever been included in any one act" (81 Cong. Rec. 7657). This Court has stated that it views "§§ 7 (a), 3 (g) and 3 (j) of the Act as necessarily indicative of a Congressional intention to guarantee either regular or overtime compensation for all actual work or employment." *Tennessee Coal Co.* v. *Muscoda Local*, 321 U. S. 590, 597. Certainly there is no basis in the language of the Act for con-

cluding that piece workers are not suffered or permitted to work in actual employment by an employer; and, if they are, the Act, by its terms applies to them.

The District Court stated no reason for regarding the Act as inapplicable, but apparently it concluded that the references to a minimum amount "an hour" in Section 6 of the Act and to "regular rate" in Section 7 precluded application of the Act to piece workers.* But this Court has recognized that, although neither Section 6 nor Section 7 of the Act speaks "specifically of any other method of paying wages except by hourly rate," nonetheless these provisions may be applied to employees not paid on an hourly basis; and this is true even though in a given case the wages actually paid, when reduced to an hourly basis, may fluctuate from week to week. *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, 579, 580. This Court there had "no doubt that pay by the week, to be reduced by some method of computation to hourly rates, was also covered by the Act" (p. 579). The obvious method of computation to be employed is to divide the weekly wage by the number of hours worked. If the hourly rate varies from week to week because the same weekly wage is paid for irregular weekly hours, the rate

* The demurrer alleged, among other reasons, that the information failed to charge a crime because it did not allege that the employees "were employed and working at a regular rate of pay and subject to the Act" (R. 17).

is nevertheless "regular in the statutory sense, inasmuch as the rate per hour does not vary for the entire week" (*id.* at 580).

There is no reason to doubt that piece-rate pay should be translated into hourly pay by substantially the same method and that it comes equally within the scope of the statutory language. Taking this view, the Administrator of the Wage and Hour Division has stated that:

> Where an employee is employed on a piecework basis, his regular hourly rate of pay is computed by dividing the total weekly piecework earnings (including production bonuses, if any) by the number of hours worked in the week. For his overtime work the pieceworker is entitled to be paid a sum, in addition to his weekly piecework earnings, equivalent to one-half the regular hourly rate of pay multiplied by the number of hours worked in excess of 40 in the week. * * *[5]

This interpretation by the Administrator, expressing as it does "the view of those experienced in the administration of the Act and acting with the advice of a staff specializing in its interpretation and application," is persuasive. *Walling* v. *Hel-*

[5] Interpretative Bulletin No. 4 (originally issued November 1938), as revised, par. 8. For enforcement purposes, the Administrator has advised that he views payment of one and one-half times the applicable piece rate as substantial compliance with Section 7 under certain circumstances (provided of course this yields not less than the minimum wages required by the Act).

merich & Payne, Inc., No. 27, this Term, p. 4, n. 5 of slip report; *Overnight Motor Co.* v. *Missel, supra*, at pp. 580–581, n. 17. The foregoing method of calculating the regular hourly rate of piece workers has been followed in the courts. *Walling* v. *Reilly*, 7 Wage Hour Rept. 1026 (E. D. Pa., 1944); *Walling* v. *Harnischfeger Corp.*, 54 F. Supp. 326 (E. D. Wis.) (appeal pending, C. C. A. 7); *Walling* v. *Black Diamond Coal Mining Co.*, 6 Wage Hour Rept. 1283 (W. D. Ky., 1943); *Walling* v. *Blue Mountain Logging Co.*, 6 C. C. H. Labor Cas. par. 61,466 (W. D. Wash., 1942); *Holland* v. *U. S. Bedding Co.*, 5 Wage Hour Rept. 262 (W. D. Tenn., 1942).

Even if emphasis be placed upon the references to hourly pay in the language of the applicable sections of the Act, the inclusion of piece workers is not precluded. The requirement of Section 6 is that wages be "at the rates" prescribed, which at present are "not less than 30 cents an hour." Section 7 requires that overtime compensation be paid "at a rate not less than one and one-half times the regular rate * * *." This language does not impose a requirement that employees be paid on an hourly basis, but refers to the level of compensation whatever may be the method of determining payments. With reference to piece rates this Court has pointed out that although the legislative history "is inconclusive as to the intended meaning of the words [in Section 7(a)

'the regular rate at which he is employed' ", the omission of the word "hourly" which had modified "rate" in the quoted phrase in an earlier draft of the bill, may have occurred because it is "not descriptive of piecework or salary payments," *Missel* case, *supra*, at pp. 579–580. Nothing in the language of the Act suggests that this conclusion of the Court is unsound or that piece rates were not intended to be covered.

The evils which Congress sought to eliminate by the enactment of the Act permit of no distinction between employees paid on a time basis and those paid at piece rates. Although the legislative history of the Act contains no specific statement that low piece-work wages were among the substandard wages sought to be corrected, they clearly were intended to be included insofar as they prevailed. They, not less than low hourly wages, might produce "wages too low to buy the bare necessities of life." They might, also, accompany "long hours of work injurious to health." S. Rep. No. 884, 75th Cong., 1st sess., p. 4. All methods of wage payment may equally be subject, "as a matter of economic fact, to the evils the statute was designed to eradicate." See *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 127. The exclusion of piece rate workers from the Act would to that extent frustrate the declared policy of Congress to eliminate, as "an unfair method of competition in commerce" which leads to labor disputes and interferes with the orderly and fair market-

ing of goods, "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers" (Section 2). Such a construction would carry to an extreme a narrow, grudging method of interpretation which this Court has held to be inappropriate to the Act. *Tennessee Coal Co.* v. *Muscoda Local*, 321 U. S. 590, 597.

In actual fact thousands of workers in the manufacturing, mining, and other industries subject to the Act were and are paid at piece work rates,* and thousands more according to premium

*The following table, based upon recent studies, shows the percentage of workers paid on a straight piece rate basis in certain of the industries subject to the Act and the approximate number of wage earners in those industries:

Industry	Year of study	Proportion paid on basis of straight piece rate	Number of wage earners 1939
Boot and shoe	1939	80.7%	228,028
Boot and shoe cut stock and findings	1939	40.1%	18,845
Hosiery:			
Full-fashioned	1938	Large majority	97,200
Seamless	1938	Large majority	61,852
Knit goods (other than hosiery):			
Knitted underwear	1938	53.8%	38,536
Knitted outerwear	1938	49.7%	22,549
Hat industries:			
Fur felt	1939	57.7%	9,938
Wool felt	1939	39.9%	4,421
Gloves	1941	51.2%	12,297
Cigar	1940	About ¾	50,897
Furniture	1941	Over ½	177,535
Leather	1939	38.5%	41,795
Meat packing	1937	4.4%	120,493

The figures giving the numbers of wage earners in the foregoing table are from the United States Bureau of the Census,

or bonus systems which are variations of the piece rate method.[7] In many of the industries in which piece rate and incentive systems are prevalent,

Census of Manufactures, 1939. The remaining information is drawn from the following publications of the United States Department of Labor, Bureau of Labor Statistics: *Earnings and Hours in the Boot and Shoe and Allied Industries During First Quarter of 1939*, Bull. 670 (p. 10 for boots and shoes, p. 59 for boot and shoe cut stock and findings); *Earnings and Hours in the Hosiery Industry, 1938*, Serial No. R–955 (p. 9 for full-fashioned, p. 34 for seamless); *Hourly Earnings in Knit Goods Industries (Other Than Hosiery), September 1938*, Serial No. R–1033 (p. 7 for Knitted Underwear, pp. 18–19 for Knitted Outerwear); *Earnings and Hours in the Fur-Felt, Wool-Felt, and Straw Hat and Hat Materials Industries, 1939*, Bull. 671 (p. 9 for fur felt hats, p. 19 for wool felt hats); *Earnings and Hours in the Glove Industry, July 1941*, Bull. 702, p. 13; *Hours and Earnings in the Cigar Industry, 1940*, Serial No. R–1387, pp. 5–6; *Hourly Earnings in the Furniture Industry, 1941*, Serial No. R. 1330, p. 4; *Earnings and Hours in the Leather and Leather Belting and Packing Industries, 1939*, Bull. 679, p. 15 for leather; *Earnings and Hours in the Meat-Packing Industry, 1937*, Serial No. R–1016, p. 7.

[7] Studies made in 1935, covering a cross-section of industry including 631 manufacturing establishments employing 700,699 wage earners indicated that 43.7 percent were employed upon a piece rate or other incentive basis, 22.1 percent at straight piece rates and an additional 21.6 percent on some premium or bonus system. The over-all percentage compensated on an incentive basis was practically the same as had been indicated by a survey conducted in 1924 (see *Financial Incentives, National Industrial Conference Board Studies No. 217*, Table I, p. 17).

A study by the National Industrial Conference Board in 1939 (*National Industrial Conference Board, Studies in Per-*

substandard wages were widespread at the time of the enactment of the Act.[7] Piece rates and premium or bonus systems are used interchangeably or simultaneously with the time basis of pay in most of these industries; in many such industries both time workers and piece workers are

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sonnel Policy, No. 19, Some Problems in Wage Incentive Administration), showed that 61.6 percent of the workers in 300 companies studied were paid according to an incentive system (p. 11, Table 4).

[8] The following table is illustrative:

Industry	Percent earning less than 25 cents an hour	Percent earning less than 30 cents an hour
Boots and shoes (unskilled)		32
Knitted outerwear (unskilled)	13.9	58.1
Knitted underwear (unskilled)	22.8	41
Seamless hosiery (unskilled)	29.3	48.5
Full-fashioned hosiery (unskilled)	17.4	28.5
Work and knit gloves	26.5	39

The sources of the above information are the following publications of the United States Department of Labor:

Earnings and Hours in Shoe and Allied Industries During First Part of 1939, Bureau of Labor Statistics Bull. 670, p. 13; *Hourly Earnings in Knit Goods Industries (other than hosiery), September 1938*, Bureau of Labor Statistics Serial No. R-1033, p. 9 for underwear, p. 20 for outerwear; *Earnings and Hours in the Hosiery Industry, 1938*, Bureau of Labor Statistics Serial No. R-955, p. 12 for full-fashioned, p. 36 for seamless; *Hours and Earnings in Certain Men's Wear Industries*, Women's Bureau Bull. 163-6, p. 16 (work and knit gloves).

See also *Walling* v. *T. Buettner & Co.*, 5 Wage Hour Rept. 279 (N. D. Ill., 1942), *infra*, p. 15, and *Walling* v. *American Needlecrafts*, 139 F. (2d) 60 (C. C. A. 6), in which the piece work rates involved, which were paid for homework, yielded approximately 10 cents an hour.

found in practically every occupation.[9] It would run counter to the expressed purpose of Congress to conclude that the benefits of the Act are withheld from piece workers engaged in the same occupations as covered employees who are paid by the hour for the same work, when the same evils of substandard wages and long hours prevail with respect to the former as with respect to the latter. A decision that the Act is inapplicable to piece workers would provide employers, particularly where employees are unorganized or otherwise in a weak bargaining position, with a simple means of avoiding the Act by changing from a time basis of pay to a piece work basis. Wholly unfair and unwarranted competitive advantages would quickly arise, and the effectuation of the objectives of the Act would be seriously impaired.

For all of the foregoing reasons we think it is obvious that the Act was intended to apply to piece workers. The Administrator has so construed it from the beginning,[10] and no court here-

[9] United States Department of Labor, Bureau of Labor Statistics, *Effect of Incentive Payments on Hourly Earnings*, Bulletin 742 (Reprinted from the Monthly Labor Review, May 1943), Table I, pp. 4–5. See, e. g., *Holland* v. *U. S. Bedding Co.*, 5 Wage Hour Repf. 262 (W. D. Tenn., 1942): "The work is done on day basis and on what is called piece work basis; and these employees sometimes do both day work and piece work".

[10] In Interpretative Bulletin No. 1, originally issued October 12, 1938, almost two weeks before the effective date of the Act; the Administrator announced that "The Act is not limited to employees working on an hourly wage. The re-

tofore has ever doubted this interpretation. It has been assumed in numerous decisions that piece workers are not exempt, and violations with respect to them have been dealt with accordingly. *Walling* v. *Bonifas-Gorman Lbr. Co.*, 7 Wage Hour Rept. 1039 (W. D. Mich., 1944); *Walling* v. *Reilly*, 7 Wage Hour Rept. 1026 (E. D. Pa., 1944); *Walling* v. *Livernois*, 50 F. Supp. 978 (E. D. Mich.); *Walling* v. *Black Diamond Coal Mining Co.*, 6 Wage Hour Rept. 1283 (W. D. Ky., 1943); *Domenech* v. *Cities Delivery Express*, 5 Wage Hour Rept. 562 (D. P. R., 1942); *Walling* v. *Blue Mt. Logging Co.*, 6 Labor Cas. (C. C. H.), par. 61,466 (W. D. Wash., 1942). The cases cited *supra*, p. 8, with reference to the method of calculating the regular rate of pay for overtime purposes under the piece work plan recognize affirmatively that the statute applies to workers who are paid by the piece." Several recent decisions hold that homeworkers, paid by the piece, are covered. See *Walling* v. *American Needlecrafts*, 139 F. (2d) 60 (C. C. A. 6); *Fleming* v. *Demeritt Co.*, 56

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quirement of Section 6 * * * is that the employees must be paid *at the rate* of not less than 25 cents an hour * * *. This does not mean that employees cannot be paid on a piece-work basis. * * *; it merely means that whatever the basis on which the workers are paid, whether it be monthly, weekly, or on a piece-work basis, they must receive at least the equivalent of the minimum hourly rate." This language is now par. 8 of the revision of December 1940.

See also Interpretative Bulletin No. 4 (originally issued November 1938), par. 8, *supra*, p. 7, footnote 5.

F. Supp. 376 (D. Vt.); *Walling* v. *T. Buettner & Co.*, 5 Wage Hour Rept. 279 (N. D. Ill., 1942), reversed on another ground, 133 F. (2d) 306 (C. C. A. 7), certiorari denied, 319 U. S. 771; *Wagner* v. *Estate of Abe Field*, 4 Wage Hour Rept. 329 (Super. Ct., Allen County, Ind., 1941). In the *American Needlecrafts* case it is pointed out that Section 6 (a) (5) of the Act, which makes special provision for the establishment of minimum piece rates for homework in Puerto Rico and the Virgin Islands, is evidence of the general intent of Congress to include workers of this type within the Act. The court in *Fleming* v. *Demeritt Co.* notes the failure in 1939 of several attempts to amend the Act to permit the authorization of lower piece work wages and longer hours for homework than prevail generally under the Act, and stresses the uniform acknowledgment in Congress during the discussion that the statutory standards apply in the absence of such an amendment.[11] This Congressional understanding with respect to the meaning of the Act so soon after its adoption is, we submit, convincing evidence of its proper interpretation. If homeworkers, paid by the piece, are covered, other piece workers almost necessarily must be also.

[11] Amendments dealing specifically with wage orders applicable to Puerto Rico and the Virgin Islands were adopted in the Act of June 26, 1940, c. 432, Sec. 3, 54 Stat. 615.

CONCLUSION

The judgment of the District Court should be reversed.

CHARLES FAHY,
Solicitor General.
RALPH F. FUCHS,
Department of Justice.

DOUGLAS B. MAGGS,
Solicitor,
BESSIE MARGOLIN,
Assistant Solicitor,
JOSEPH I. NACHMAN,
Attorney,
United States Department of Labor.

NOVEMBER 1944.

APPENDIX

The pertinent provisions of the Fair Labor Standards Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U. S. C. Sec. 201 *et seq.*, are as follows:

* * * * *

SEC. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

* * * * *

SEC. 3. As used in this Act—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

* * * * *

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer.

* * * * *

(g) "Employ" includes to suffer or permit to work.

* * * * *

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cents an hour,

(2) during the next six years from such date, not less than 30 cents an hour,

(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under section 8, whichever is lower, and

(4) At any time after the effective date of this section, not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 8, * * *

* * * * *

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * *

SEC. 11. * * *.

* * * * *

(c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation

or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

* * * * *

SEC. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation;

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14;

* * * * *

(5) to violate any of the provisions of section 11 (c), or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

* * * * *

SEC. 16. (a) Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

* * * * * *

U.S. GOVERNMENT PRINTING OFFICE 1944

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 106

THE UNITED STATES OF AMERICA,

Appellant,

vs.

HERMAN ROSENWASSER, an individual, doing business under the firm name and style of PERFECT GARMENT COMPANY,

Appellee.

BRIEF OF APPELLEE.

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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Appellee.

BRIEF OF APPELLEE.

Question Presented.

The statement of the question as proposed by the government in its opening brief (B2) is too broad and avoids any reference to the criminal provisions of the Act in question. The main question should be limited to the requirement of a statute so as to charge a crime, and it is therefore subject to amendment so as to read:

> Does the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C., Sec. 207(a)(3) sufficiently and explicitly describe with appropriate definiteness that employees compensated at an *irregular rate* (piece rate employees) are subject to the criminal provision of the Act?

Contention of the Government.

The government has made the point in its opening brief for reversal of the order sustaining the demurrer of the appellee as follows:

> 1. That although the Fair Labor Standards Act does not explicitly provide that employees compensated at an *irregular rate* shall be subject to the Act, it was the intent of Congress to include them.

In answer to this point we respectfully submit:

That such a conclusion is mere speculation and the issue in this case involves far more than merely the intent of Congress. It involves the fundamental constitutional rights of an accused to justice which are guaranteed by the Fifth Amendment to the Constitution of the United States.[1]

The government's theory relating to the Act consists largely of generalities and assumptions, and the view of the Administrator of the Wage and Hour Division (B7). It is repugnant to common sense and sound reason to assume that the Administrator's opinion can extend or enlarge a statute by construction. *United States v. Cohen Grocery Co.*, 255 U. S. 81, 89.[2]

The presidential message of May 24, 1937, expressed the hope that employment might be spread "among those

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[1]Due Process of Law:

"* * * nor be deprived of life, liberty or property without due process of law; * * *."

Due process of law in a criminal proceeding has been defined as consisting of "a law creating or defining the offense * * *." *Simons v. U. S.*, 119 F. (2d) 539, 544. Certiorari denied, 316 U. S. 616.

[2]See also *U. S. v. Grimaud*, 220 U. S. 506, 520, 523.

groups in which unemployment today principally exists." 1941 Wage and Hour Man. 747, 749.

The Committee reports[3] upon the bill which became the Fair Labor Standards Act, makes it clear that the only purpose of the proposed act was to increase employment, to require a fair day's pay for a fair day's work by raising the wages of the most poorly paid workers and reducing the hours of those most overworked, and thus correct inequalities in the cost of producing goods and prevent unfair competition in commerce.

The history of the Act is consistent and clearly indicates that Congress never intended to include piece rate employees in the original Act and did not deem them subject to regulation. Congress can readily remedy the Act as it did in 1940 by an amendment[4] (Sec. 6(a)(5)) to specifically include piece rate employees. This amendment expresses Congress' intention to limit piece workers to the Virgin Island and Puerto Rico and it must have deemed that the piece rate workers in the United States were being adequately compensated, otherwise it would have made provision for them.

The Act does not provide that the Administrator or the Court are to define "regular hour" by regulation. There is nothing in the words of the Act to suggest that Congress intended to include piece rate employees other than those specifically mentioned (Sec. 29, U. S. C. 206(a)(5).)

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[3]H. R. 1452, 75th Cong., 1st Sess.; H. R. 2182, 75th Cong., 3d Sess.; S. R. 884, 75th Cong., 1st Sess.

[4]Amendments dealing specifically with wage orders applicable to Puerto Rico and Virgin Islands were adopted in the Act of June 26, 1940, c. 432, Sec. 3; 54 Stats. 615.

The Act does not define piece work and is devoid of any subject other than minimum wages and hours of work and this Court has construed it as dealing only with these subjects. (*United States v. Darby*, 312 U. S. 100, 115, 117, 122, 125.)

The government has labored to show that piece rate employees are subject to the Act, in that it has been held in numerous decisions that piece rate employees are not exempt (B14), and has cited several cases, but none of them meet the issue of the definiteness and certainty required of a statute to charge a crime. The precise point, involving this Act, was not before the Court in any of the decisions, and there is nothing in conflict with the construction of the statute for which we contend. There is not one word which we can find in any of the cases cited that has application to the Constitutional guarantees under the Fifth Amendment. All interpreted the civil liabilities of the Act. The distinction between civil and criminal liability is of vital importance in determining whether the Act sufficiently defines piece rate employees. The requirements of each is essentially different.

We do not contend that Congress does not have authority to legislate as to piece rate employees but only that the uncertainty of the Act, pertaining to the criminal provisions, affects the fundamental rights and liberty of citizens.

Government counsel are asking this Court to so construe the Act as to make it applicable even though Congress has not seen fit to include piece rate workers. The argument at (B9, 13, 14) of the government's brief, is one that should be directed to Congress and not to a judicial tribunal.

Argument.

We must keep in mind the zealous safeguards provided in the Constitution to protect an individual charged with a crime. There are no common law crimes punishable by the Federal Government and before one can be charged with a criminal act, the act charged must be clearly and unmistakably within the provisions of a Federal penal statute. These may not be enlarged by construction to include kindred acts which the courts may consider as reprehensible as those denounced by the statute. (*Fasulo v. United States*, 272 U. S. 620.)

New situations may call for a new application of statutory and constitutional provisions but that does not mean that the plain terms of a penal statute may be extended by judicial construction to include persons or acts not within the scope when it was originally passed. (*Fasulo v. United States*, *supra*.) However desirable it might be to have the law include piece-rate employees, it is not the province of the Court in a criminal case to create an offense by construction. (*Arnold v. U. S.*, 115 F. (2d) 523.) The words of the statute must be such as to leave no reasonable doubt as to the intention of the legislature and where there is any well founded doubt as to any act being a public offense, it should not be declared such. (*McFarland v. United States*, 19 F. (2d) 807, 808.)[5]

It is an established principle that penal statutes must be certain and that before one may be lawfully punished thereunder his case must be clearly within the provisions

[5] *Cf. Securities Exchange Commission v. C. M. Joiner Leasing Corp., et al.*, 320 U. S. 345, 354, 355.

of the statute. Any doubt as to its meaning must be resolved in favor of the liberty of the citizen. (*U. S., v. Wiltberger*, 5 Wheaton 73, 5 L. Ed. 37; *Connally v. General Construction Co.*, 269 U. S. 385; *U. S. v. Noveck*, 271 U. S. 201; *U. S. v. Katz*, 271 U. S. 354; *Fasulo v. U. S., supra*; *Pierce v. U. S.*, 314 U. S. 306.)

There are many possible interpretations of the phrase "regular rate"[6] and it was never intended by Congress that those who might be subject to the Act should be required to calculate any other formula than that which was provided, namely, one and one-half times the *regular rate* at which he is employed. Sec. 7(a)(3). The test is whether the statute is clear, plain and unmistakably understandable by citizens of average intelligence. This uncertainty was a determinative factor which prompted the District Court judge to sustain the demurrer [R. 16; 17] so as to protect the fundamental guarantees that cannot be destroyed without the destruction of the essential features of our government and that are guarantees, and protect, at all times, people charged or suspected of crimes, by those holding positions of power and authority.

Human liberty, as guaranteed by the United States Constitution,[7] is too precious to permit an invasion without explicitly informing all who are subject to a statute, what acts it is their duty to avoid. (*U. S. v. Brewer*, 139 U. S. 278, 288; *Pierce v. U. S., supra*; *U. S. v. McDermott*, 131 F. (2d) 313, certiorari denied 318 U. S. 765.)

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[6]52 Yale L. J. 159 (1942).

[7]Fifth Amend. to U. S. Constitution.

Conclusion.

The protection of the Constitutional rights of citizens is required, if due process is to remain a living force and not become an empty theory in the conduct of criminal prosecutions.

We submit the law fully justified the District Court in its ruling.

The judgment of the District Court should be affirmed.

VICTOR BEHRSTOCK,
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BERNARD B. LAVEN,
Of Counsel.

APPENDIX.

The pertinent provisions of the Fair Labor Standards Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U. S. C., Sec. 201 *et seq.*, are as follows:

* * * * * * * * *

Sec. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct, and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

* * * * * * * * *

Sec. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

* * * * * * * * *

(5) if such employee is a home worker in Puerto Rico or the Virgin Islands, not less than the minimum piece rate prescribed by regulation or order; or, if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the minimum hourly wage rate applicable under the provisions of this section. The Administrator, or his authorized representative, shall have power to make such regulations or orders as are necessary or appropriate to carry out any of the provisions of this paragraph, including the power without limiting the generality of the foregoing, to define any operation or occupation which is performed by such home work employees in Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined; to prescribe the method and procedure for ascertaining and promulgating minimum piece rates; to prescribe standards for employer piece rates, including the proportion or class of employees who shall receive not less than the minimum hourly wage rate; to define the term "home worker"; and to prescribe the conditions under which employers, agents, contractors, and subcontractors shall cause goods to be produced by home workers.

(b) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

(c) The provisions of paragraphs (1), (2), and (3) of subsection (a) of this section shall be superseded in the case of any employee in Puerto Rico or the Virgin Islands engaged in commerce or in the production of goods for commerce only for so long as and in so far as such employee is covered by a wage order issued by the Administrator pursuant to the recommendations of a special industry committee appointed pursuant to section 5 (c).[1]

* * * * * * * * *

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

[1] Amendment provided by Act of June 26, 1940 (Public Res. No. 88, 76th Congress).

* * * * * * * * *

SEC. 16. (a) Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

* * * * * * * * *

SUPREME COURT OF THE UNITED STATES.

No. 106.—October Term, 1944.

The United States of America, Appellant, *vs.* Herman Rosenwasser, an Individual, Doing Business Under the Firm Name and Style of Perfect Garment Company.	Appeal from the District Court of the United States for the Southern District of California.

[January 2, 1945.]

Mr. Justice Murphy delivered the opinion of the Court.

This is a direct appeal from a judgment of the District Court for the Southern District of California. That court sustained appellee's demurrer to an information charging violations of the minimum wage, overtime and record-keeping provisions of the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C. § 201 *et seq.* This was done on the ground that the Act is inapplicable where employees are compensated at piece rates, as is the case in appellee's garment business. We are thus met with the clear issue of whether the Act covers piece rate employees so as to subject their employers to its criminal provisions.

Neither the policy of the Act nor the legislative history gives any real basis for excluding piece workers from the benefits of the statute. This legislation was designed to raise substandard wages and to give additional compensation for overtime work as to those employees within its ambit, thereby helping to protect this nation "from the evils and dangers resulting from wages too low to buy the bare necessities of life and from long hours of work injurious to health." Sen. Rep. No. 884 (75th Cong., 1st Sess.) p. 4; *United States* v. *Darby*, 312 U. S. 100. No reason is apparent why piece workers who are underpaid[1] or who work long hours

[1] The Government points out that United States Department of Labor statistics show that 25.5% to 48.5% of the unskilled workers paid under the piece rate or incentive systems in six industries (boot and shoe, knitted outerwear, knitted underwear, seamless hosiery, full fashioned hosiery and work and knit gloves) received less than 30 cents an hour at approximately the time of the passage of the Act.

do not fall within the spirit or intent of this statute, absent an explicit exception as to them. Piece rate and incentive systems were widely prevalent in the United States at the time of the passage of this Act[2] and we cannot assume that Congress meant to discriminate against the many workers compensated under such systems. Certainly the evils which the Act sought to eliminate permit of no distinctions or discrimination based upon the method of employee compensation and none is evident from the legislative history.

The plain words of the statute give an even more unmistakable answer to the problem. Section 6(a) of the Act provides that "every employer" shall pay to "each of his employees who is engaged in commerce or in the production of goods for commerce" not less than specified minimum "rates," which at present are "not less than 30 cents an hour." Section 7(a) provides that "no employer" shall employ "any of his employees" for longer than specified hours in any week without paying overtime compensation "at a rate not less than one and one-half times the regular rate at which he is employed." The term "employee" is defined in Section 3(e) to include "any individual employed by an employer," with certain exceptions not here pertinent being specified in Section 13, and the term "employ" is defined in Section 3(g) to include "to suffer or permit to work."

A broader or more comprehensive coverage of employees within the stated categories would be difficult to frame. The use of the words "each" and "any" to modify "employee," which in turn is defined to include "any" employed individual, leaves no doubt as to the Congressional intention to include all employees within the scope of the Act unless specifically excluded.[3] And "each"

[2] The Government farther points out that large percentages of workers are paid on a straight piece basis in the following industries: boot and shoe, boot and shoe cut stock and findings, hosiery, knit goods, hat industries, gloves, cigar, furniture, leather and meat packing. It also states that studies made in 1935, covering a cross section of industry including 631 manufacturing establishments employing 700,699 wage earners, indicated that 22.1% were employed at straight piece rates and an additional 21.6% on some premium or bonus system. Another study made in 1939 revealed that 61.6% of the workers in 300 companies studied were paid according to an incentive system. National Industrial Conference Board, Studies in Personnel Policy, No. 19, Some Problems in Wage Incentive Administration, p. 11, Table 4.

[3] Sen. Rep. No. 884 (75th Cong., 1st Sess.) p. 6, states that the term "'employee' is defined to include *all* employees. . . ." (Italics added.) Senator Black said on the floor of the Senate that the term "employee" had been given "the broadest definition that has ever been included in any one act." 81 Cong. Rec. 7657.

and "any" employee obviously and necessarily includes one compensated by a unit of time, by the piece or by any other measurement.[4] A worker is as much an employee when paid by the piece as he is when paid by the hour. The time or mode of compensation, in other words, does not control the determination of whether one is an employee within the meaning of the Act and no court is justified in reading in an exception based upon such a factor. When combined with the criminal provisions of Sections 15 and 16, the unrestricted sweep of the term "employee" serves to inform employers with definiteness and certainty that they are criminally liable for willful violations of the Act in relation to their piece rate employees as well as to their employees compensated by other methods. *See United States* v. *Darby*, *supra*, 125, 126.

The fact that Section 6(a) speaks of a minimum rate of pay "an hour," while Section 7(a) refers to a "regular rate" which we have defined to mean "the hourly rate actually paid for the normal, non-overtime workweek," *Walling* v. *Helmerich & Payne, Inc.*, 323 U. S. — (slip-sheet opinion, p. 3), does not preclude application of the Act to piece workers. Congress necessarily had to create practical and simple measuring rods to test compliance with the requirements as to minimum wages and overtime compensation. It did so by setting the standards in terms of hours and hourly rates. But other measures of work and compensation are not thereby voided or placed outside the reach of the Act. Such other modes merely must be translated or reduced by computation to an hourly basis for the sole purpose of determining whether the statutory requirements have been fulfilled. *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, 579; *Walling* v. *Helmerich & Payne, Inc.*, *supra* (slip-sheet opinion, p. 3). These hourly standards are not so phrased as reasonably to mislead employers into believing that the Act is limited to employees working on an hourly wage scale. Nor can a court rightly use these standards

[4] The Act of June 26, 1940, c. 432, Sec. 3, 54 Stat. 615, added Section 6(a)(5) to the Fair Labor Standards Act. This new section makes provision for establishing minimum piece rates by regulation or order for homework in Puerto Rico and the Virgin Islands. This is evidence of a Congressional intent to include workers of this type within the Act and a recognition that without this special provision homeworkers in Puerto Rico and the Virgin Islands paid by the piece would be subject to the ordinary statutory provisions relating to minimum wages.

as a basis for cutting off the benefits of the Act from employees paid by other units of time or by the piece. If that were permissible, ready means for wholesale evasion of the Act's requirements would be provided.

It follows that the court below erred in sustaining appellee's demurrer to the information. Its judgment is

Reversed.

Mr. Justice ROBERTS dissents.